

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2963-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL GALLETTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Michael Galletto appeals his judgment of conviction for battery, contrary to WIS. STAT. § 940.29(1), and an order denying his motion to dismiss for denial of the right to a speedy trial. Galletto argues that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the amount of time between the date of the remand and the date of the retrial was unreasonable and prejudicial. We disagree and affirm the conviction.

BACKGROUND

¶2 Galletto was charged with one count of battery. He was convicted on March 25, 1997, by a six-person jury and sentenced to six months in jail. Galletto served his sentence. We summarily reversed his conviction on July 7, 1998, and remanded to the trial court. *State v. Galletto*, No. 97-2668 (Wis. Ct. App. July 7, 1998).

¶3 The appellate record was returned to the trial court on August 12, 1998. No further trial court entries were made until a status conference was scheduled for December 6, 1999. Retrial was then scheduled for February 2000. On January 20, 2000, Galletto filed a motion to dismiss, claiming his right to a speedy trial had been violated. The trial court denied the motion.

¶4 The case proceeded to trial and Galletto was convicted again. The trial court sentenced Galletto to time served. This appeal followed.

STANDARD OF REVIEW

¶5 The constitutional right to a speedy trial is found in the Sixth Amendment to the United States Constitution and art. 1, § 7, of the Wisconsin Constitution. Whether a defendant has been denied the right to a speedy trial is a constitutional question that we review independently of the trial court. *State v. Ziegenhagen*, 73 Wis. 2d 656, 664, 245 N.W.2d 656 (1976).

DISCUSSION

¶6 When a defendant asserts a violation of the constitutional right to a speedy trial, “the court employs a four-part balancing test considering: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.” *State v. Borhegyi*, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). “If, under the totality of circumstances, the defendant was denied the benefit of his constitutional right to a speedy trial, dismissal of the charges is required.” *Id.* at 509-10 (citing *Barker*, 407 U.S. at 522).

I. LENGTH OF DELAY

¶7 Before weighing other circumstances, the defendant must show that the length of delay is presumptively prejudicial. *See Borhegyi*, 222 Wis. 2d at 510. The United States Supreme Court has refused to implement a bright line rule as to the length of delay necessary to trigger presumptive prejudice. *Barker*, 407 U.S. at 514. However, the State concedes that generally the courts have ruled that presumptive prejudice arises when the delay exceeds one year. *Green v. State*, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977). Here, the parties agree that the delay was eighteen months.

¶8 However, a ruling that the delay was presumptively prejudicial does not require the State to show a lack of prejudice to the defendant. *State v. Lemay*, 155 Wis. 2d 202, 212, 455 N.W.2d 233 (1990). Rather, presumptive prejudice merely triggers a review of the other three factors. *Id.* at 212-13.

II. REASON FOR THE DELAY

¶9 In weighing the totality of the circumstances, an attempt by the State to delay the defendant's case in an effort to negatively affect the defendant's

ability to defend himself should be weighed most heavily against the State. *See Borhegyi*, 222 Wis. 2d at 512. However, a delay caused by overcrowded dockets or pure negligence on the State's part should not be weighed heavily against the government. *See id.*

¶10 Admittedly, it was the State's responsibility to bring Galletto to trial. However, Galletto does not argue that the delay was due to an effort to hamper his case. The State contends that this case fell through the cracks and once it was discovered, it was put on the fast track for trial. As a result, the delay should not be weighed heavily against the State.

III. DEFENDANT'S SPEEDY TRIAL ASSERTION

¶11 A defendant's failure to assert his speedy trial right should be weighed against him, although failure to assert the right will not result in a waiver of that right. *Hatcher v. State*, 83 Wis. 2d 559, 568, 266 N.W.2d 320 (1978). (citation omitted). Here, Galletto did not assert his right to a speedy trial until he moved for dismissal in January 2000. Approximately seventeen months had passed. There is no evidence that he attempted to determine the status of his case. In addition, Galletto did not appear in court at the December 6, 1999, status conference. The circumstances suggest that Galletto "was consciously seeking to avoid the day of reckoning." *See Ziegenhagen*, 73 Wis. 2d at 669.

IV. PREJUDICE

¶12 The final factor to be considered is whether the delay resulted in prejudice to Galletto. This factor is assessed in light of the interests the speedy trial right is designed to protect: "(1) preventing oppressive pretrial incarceration;

(2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense will be impaired.” *Borhegyi*, 222 Wis. 2d at 514.

¶13 The only prejudice Galletto claims is anxiety and concern as a result of the delay. However, Galletto offers little reason as to what his anxiety and concern was other than to state that he suffered anxiety and concern. Galletto had already been through one trial so he knew what to expect from the proceedings. He also had completed his jail sentence and unless there were new factors introduced at the second trial, there existed little likelihood that he would receive additional jail time. Further, the prosecution never indicated an intention to do anything more than get a conviction.

¶14 Galletto cites *Doggett v. United States*, 505 U.S. 647 (1992), to argue that prejudice need not be shown for dismissal. However, in *Doggett*, there was a delay of eight and one-half years. In the present case, Galletto received two trials and an appellate review in three years.

¶15 The totality of the circumstances indicate that Galletto has not suffered a denial of his right to a speedy trial. The State did not intentionally hamper Galletto’s case, there was no pre-trial incarceration, and the delay did not affect Galletto’s ability to present his case. Therefore, a reversal of the charges is not warranted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

